FOR ARGUMENT

No. 89-1330

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OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,

Petitioners,

—v.—

TIMOTHY A. BROWN,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION FOR UNION DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF MARYLAND IN SUPPORT OF RESPONDENT

Helen Hershkoff
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Susan Goering
ACLU of Maryland
2219 St. Paul Street
Baltimore, Maryland 21218
(301) 889-8555

Michael J. Goldberg
(Counsel of Record)
Widener University School of Law
3800 Vartan Way
Harrisburg, Pennsylvania 17110
(717) 541-3938

Judith R. Schneider
Association for Union Democracy
30 Third Avenue, #619
Brooklyn, New York 11217
(718) 855-6650

Clyde W. Summers
University of Pennsylvania School of Law
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-6867

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INTEREST OF *AMICI*[1]

The Association for Union Democracy (AUD) is a nonprofit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective.

The sponsors of the Association include former leaders of major unions, religious leaders, members of union public review boards, lawyers, prominent educators in labor studies and labor law, and numerous union members. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which helps sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal operations.

The Association has assisted union members seeking to secure honest and fair elections in the United Mine Workers of America in 1972 and the United Steelworkers in 1978. The AUD is currently playing a similar role in elections being held in the International Brotherhood of Teamsters pursuant to the civil RICO consent decree in *United States v. International Brotherhood of Teamsters*, 88 Civ. 4486 (S.D.N.Y. Mar. 13, 1989).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Maryland is one of its statewide affiliates. For over forty years, the ACLU has supported efforts in Congress

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3.

and in the courts to recognize and strengthen the rights of union members to internal union democracy. Indeed, as commentators have noted, the legislative campaign that eventually culminated in the enactment of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) "was formally launched by the American Civil Liberties Union [when it] submitted a 'Trade Union Democracy' bill to the Congress during the 1947 hearings on new labor legislation." Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv.L.Rev. 851 (1960). *See also* Rothman, "Legislative History of the 'Bill of Rights' for Union Members," 45 Minn.L.Rev. 199, 201-06 (1960).

Because the rights of union members to democratic self-governance are implicated by the decision below, the AUD and the ACLU join with respondent and urge the Court to affirm the judgment below.

SUMMARY OF ARGUMENT

This case raises a question of statutory construction essential to a worker's right to free and fair union elections: whether §401(c) of the LMRDA, 29 U.S.C. §481(c), requires deference to a union's election rules when a court evaluates the reasonableness of a candidate's request for the mailing of campaign literature at the candidate's own expense. In the real world of union elections, the issues before the Court are these: Can a union, by promulgating a restrictive rule -- in this case, one barring the use of union membership lists for campaign mailings until a period late in the campaign, after candidates are formally nominated -- prevent a candidate for union office from utilizing what is often the only effective means of communicating with union members at crucial, formative stages of a candidate's campaign? And can a union, through such a restrictive rule, substantially undermine the membership's right to be kept

informed of union affairs? The LMRDA is designed to promote union democracy by providing for fair and informed union elections. The answers to these questions must therefore be no.

The clear and unambiguous language of §401(c) requires unions to "comply with *all* reasonable requests" of a candidate to mail campaign literature to the union's membership at the candidate's expense (emphasis added). Nothing in the language or legislative history of that section supports petitioners' contention that the reasonableness of a candidate's request must be measured by its consistency with the union's own election rules. On the contrary, when Congress intended rights created by the LMRDA to yield to reasonable union rules, it quite explicitly provided for that result in other sections of the Act. Where union rules conflict with LMRDA rights that are not limited by such provisos -- like those in §401(c) -- Congress made clear its intent that such union rules "shall be of no force or effect." LMRDA §101(b), 29 U.S.C. §411(b).

The legislative purpose of the LMRDA supports this reading: LMRDA was intended to help alleviate union corruption by promoting democracy in internal union affairs. In pursuing that goal, Congress recognized that incumbents often enjoy tremendous advantages over their challengers in union elections. Congress thus designed the LMRDA to reduce the advantages of incumbency and to level the playing field between challengers and incumbents in union elections.

In particular, Congress intended the candidate mailing rights provided by §401(c) to counteract one of the most important advantages enjoyed by incumbents -- control over the means of communication with the union's membership. Incumbent union officers are in a position to use their control over the union newspaper, in effect, to begin their reelection campaigns the day after they take office. They typically do so in the con-

text of a one-party system, without any organized, ongoing opposition. Congress recognized that union elections will be fair only if challengers also have opportunities for early communication with the membership through §401(c) mailings.

Congress also intended the LMRDA to enable union members to obtain the knowledge they need to make informed decisions about union affairs and to cast informed votes in union elections. In the context of the union member's "right to know" and the Act's remedial purpose, §401(c) must be construed to permit candidates to mail campaign literature at their own expense any time during a campaign, when key issues are emerging, candidates are assembling their slates, and the voters' minds are still open.

Even if this Court concludes that some deference is due reasonable union election rules in determining the reasonableness of a candidate's request for the mailing of campaign literature, the union rules at issue in this case are entitled to no deference because they violate the LMRDA's legislative purpose and are therefore unreasonable. The antidemocratic effects of petitioners' rules are substantial and far outweigh any legitimate union interests advanced in their support.

I. THE PLAIN MEANING OF THE LMRDA'S WORDING REQUIRES THE REASONABLENESS OF A CANDIDATE'S REQUEST FOR THE MAILING OF CAMPAIGN LITERATURE TO BE DETERMINED WITHOUT REGARD TO UNION ELECTION RULES

According to the clear and unambiguous language of §401(c) of the LMRDA, unions must "comply with *all* reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing . . . ." 29 U.S.C. §481(c)(emphasis added). Petitioners contend that the reasonableness of a candidate's request is to be determined by considering the reasonableness of union rules limiting the candidate's right to mail campaign literature. This position is supported by neither the language nor the legislative history of the LMRDA, however, and it must therefore be rejected by this Court.

Petitioners can point to nothing in the statute or its legislative history to support their contention that the reasonableness of a candidate's request must be measured by its consistency with the union's own election rules. On the contrary, the LMRDA's wording and structure require that the reasonableness of a candidate's request for the mailing of campaign literature be determined exclusively on its own merits, without regard to inconsistent union rules. Those arguments are fully made by the respondent and the government. *Amici* will simply add a few brief points.

Where Congress intended LMRDA rights to yield to reasonable union rules, it provided for that result explicitly. *See* LMRDA §101(a)(1), 29 U.S.C. §411(a)(1) (members' right to equal treatment "subject to reasonable [union] rules"); *id.* at §101(a)(2), 29 U.S.C. §411(a)(2)(members' freedom of speech and assembly "subject to . . . reasonable [union] rules"); *id.* at §401(e), 29 U.S.C. §481(e)(members' right to run for union office "subject to . . . reasonable qualifications uniformly imposed [by the union]).

Where such explicit reasonable rule provisos were omitted from the statute, Congress made it quite clear that union rules were to yield to the rights and duties created by the statute and not, as petitioners would have it, the other way around. For example, §401(e) mandates that union elections "shall be conducted in accordance with the [union's] constitution and bylaws," but only, however, "insofar as they are not inconsistent with

the provisions of this title." 29 U.S.C. §481(e).[2]

Petitioners and *amicus* AFL-CIO are beside the point when they suggest that the decision below somehow forces unions to abandon all rules governing candidates' rights to mail campaign literature and compels union officials to rely solely on *ad hoc* decisionmaking when evaluating candidates' requests for mailings. The issue is not whether unions can have election rules. They can and they should.[3] The issue is whether they can have rules that operate to defeat candidates' rights expressly created by §401(c). That they cannot do.

Nothing in the statute suggests that Congress intended to permit unions, through their election rules, to limit the effectiveness of a candidate's mailings or to decide when meaningful campaigning through the mails could begin. Had Congress intended to bar early use of §401(c)'s campaign mailing right, it would have done so explicitly, just as the same subsection of the Act expressly limits a candidate's right to inspect union membership

[2] Similarly, in what was effectively Congress' last word on the subject, since it was added on the floor of the Senate as part of the union members' bill of rights, §101(b) states bluntly that "[a]ny provision of [a union's] constitution and bylaws . . . which is inconsistent with the provisions of this section shall be of no force or effect." 29 U.S.C. §411(b).

[3] For example, union rules could require that the estimated costs of candidate mailings be tendered to the union in advance, or that requests for mailings be submitted at least three working days before the candidate wants the literature mailed, or that all candidate mailings be handled by the XYZ commercial mailing company, all without substantively interfering with candidates' §401(c) rights to have their campaign literature mailed to the union's membership.

lists to the final thirty days of an election campaign.[4]

To be sure, at an early stage of the legislative process, Congress embraced the general principle that unions should be left free to "operate their own affairs, as far as possible." S.Rep. No. 1684, 85th Cong., 2d Sess. 4-5 (1958). But the LMRDA as finally enacted contains significant restrictions on union self-governance in order to achieve internal union democracy.[5] As this Court has recognized:

> [T]he congressional concern to avoid unnecessary intervention was balanced against the [goal of] . . . assuring that union elections would be conducted in accordance with democratic principles . . . . "Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV."

Wirtz v. Hotel, Motel & Club Employees, Local 6, 391 U.S. 492, 496 (1968), *quoting Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463, 473 (1968).

Petitioners would effectively remove from the LMRDA the very campaign mailing rights that Congress regarded as essentia' to democratic self-governance --

[4] "Every bona fide candidate shall have the right, *once within 30 days prior to an election* . . . to inspect a list containing the names and last known addresses of all members of the labor organization . . . ." 29 U.S.C. §481(c)(emphasis added).

[5] Thus, the principles of the Senate Report are not a valid guide to interpreting the LMRDA. Levy, "Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy," 30 Buffalo L.Rev. 663, 684 n.118 (1981); Goldberg, "Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement," 1989 Duke L.J. 903, 938.

thereby exacerbating the overwhelming advantages of incumbency in union elections that the Act was designed to eliminate.[6]

II. UNION LIMITATIONS ON CANDIDATE MAILINGS OF CAMPAIGN LITERATURE UNDERMINE THE LMRDA'S LEGISLATIVE PURPOSE OF LEVELING THE PLAYING FIELD BETWEEN CHALLENGERS AND INCUMBENTS IN UNION OFFICER ELECTIONS

A. The LMRDA's Legislative Purpose Was To Level The Playing Field Between Challengers And Incumbents

The LMRDA was enacted to help alleviate two serious and related problems within the labor movement: the corruption and racketeering that had been exposed by the McClellan Committee (the Select Senate Committee on Improper Activities in the Labor or Management Field), and the autocracy and lack of democracy that characterized the internal governance of many unions. *See* S.Rep. No. 187, 86th Cong., 1st Sess. 2 (1959), *in* 1 NLRB, Legislative History of the LMRDA 398 (1960) (hereinafter "Leg.Hist."). Congress recognized that entrenched union officers often become antidemocratic, *see* H.Rep. No. 741, 86th Cong., 1st Sess. 1-2 (1959), *in* 1 Leg.Hist., *supra*, at 759-60. It therefore chose to regulate union elections so as to "end[] . . . autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may . . . bring about a regeneration of union leadership." 2 Leg.Hist., *supra*, at 1099 (remarks of Senator McClellan).

Accordingly, the decisions of this Court have consistently recognized both the substantial advantages incumbents enjoy in union elections and the intent of Congress in enacting the LMRDA to reduce those advantages as a means of lessening the abuses that Congress found so frequently to be associated with entrenched leadership. The Court's most direct treatment of these issues was in *Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463. The Court held in that case that a Department of Labor challenge to a 1963 election of union officers was not rendered moot by the fact that the defendant union had conducted another unsupervised election of officers in 1965, before the challenge to the first election could be resolved. The Court recognized that "only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act [in 1963 had] not by some means perpetuate[d] their unlawful control in the succeeding election." 389 U.S. at 474. The Court explicitly based that conclusion on "the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions," *id.* -- some of the very abuses "upon which Congress rested its decision that the legislation [the LMRDA] was required in the public interest." *Id.*, *citing* S.Rep. No. 1417, 85th Cong., 2d Sess. 711-12 (1958). "Congress," the Court continued, ". . . considered the risk of incumbents' influence to be substantial, not a mere suspicion." 389 U.S. at 475.

Similarly, in *Wirtz v. Hotel Employees*, 391 U.S. 492, the Court struck down unduly restrictive candidacy requirements because they "can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb." 391 U.S. at 499. Indeed, so great was Congress' intent to eliminate the corruption and autocra-

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[6] Absent democratic self-governance, unions have experienced far more drastic government intrusions in the form of civil RICO trusteeships and similar remedies. *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *see generally* Goldberg, *supra*.

cy that it had seen so often result from incumbency that the Court in *Hotel Employees and Local 3489, United Steelworkers v. Usery*, 429 U.S. 305 (1977), concluded that the LMRDA's goal of free and democratic union elections was "a preventive measure 'to curb the possibility of abuse by benevolent as well as malevolent entrenched leaderships.'" 429 U.S. at 309, *quoting Hotel Employees*, 391 U.S. at 503.

Petitioners suggest that the Court's decision in *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), represents a retreat from the Court's previous concern over the advantages of incumbency, Pet. Br. at 16 n.3. That is not the case. In upholding a union ban on outsider contributions to union election campaigns, it is true that the Court did not go as far as the four dissenters would have in construing the Act to assist nonincumbent candidates.[7] However, the majority nevertheless expressly acknowledged that "there are undoubtedly advantages to incumbency," 457 U.S. at 115, and that "the ability of insurgent union members to wage an effective campaign [is] an interest deserving some protection under the statute." *Id.* at 112. Most important in the context of the present case, the *Sadlowski* majority viewed bans on outsider contributions as furthering congressional intent to protect unions from being "'invaded' or 'infiltrated' by outsiders" and "to ensure that union members, and not

[7] The dissenters argued that even "in the best of circumstances, the role of the challenger is very difficult. And if one keeps in mind that *Congress intended to give the challenger a fair chance even in a union controlled by unscrupulous leaders with an iron grip on the staff and a willingness to employ means both within and without the law*, it is wholly unrealistic to confine the challenger to financial support garnered within the union." 457 U.S. at 128 (White, J., dissenting)(emphasis added). It is even more unrealistic to confine a challenger's campaign mailings to a period near the very end of an election campaign. By that time, nominations are closed, slates have been assembled, commitments have been made, alliances formed -- and, all too often, the minds of the voters already made up.

outsiders, control the affairs of their union." *Id.* at 116, *quoting* Senator McClellan, 2 Leg.Hist., *supra*, at 1097-1100. In this case, however, the restriction on campaign activity functions not to protect unions from outside domination but, as argued below, only to limit radically and unnecessarily the period during which meaningful and informed debate over campaign issues can take place.

B. The Advantages Of Incumbency Are Particularly Overwhelming In Union Elections

Recognizing that labor laws concretely affect the lives of millions of working people, this Court has repeatedly emphasized the importance of rooting its labor law decisions in "the realities of labor relations." *Del-Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 167 (1983); *see also Humphrey v. Moore*, 375 U.S. 335, 358 (1964)(Goldberg, J., concurring). Accordingly, an examination of the realities of union elections is appropriate, and it demonstrates the overwhelming advantages incumbent officers almost always enjoy over their challengers.[8]

The scholarly literature examining elections of union officers is unanimous in concluding that incumbent officers have an overwhelming advantage over their chal-

[8] Although this brief speaks in terms of the advantages of incumbency, the analysis also applies to those elections where no incumbent is seeking reelection, but where one candidate has the endorsement of the retiring incumbent, from which usually follows the support of the incumbent's political machine and therefore many of the advantages of incumbency itself. This was the case, for example, in the 1977 Steelworkers election between Lloyd McBride, the candidate endorsed by outgoing president I.W. Abel, and Ed Sadlowski, the candidate cast in the role of challenger. *See United Steelworkers v. Sadlowski*, 457 U.S. at 104; James, "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections," 13 Harv. C.R.-C.L. L.Rev. 247, 340-51 (1978).

lengers in even the most honest of unions. *See, e.g.*, S. Lipset, M. Trow & J. Coleman, *Union Democracy* 9-10, 147-48, 229-33, 266-68 (1956); M. Estey, *The Unions: Structure, Development and Management* 62 (3d ed. 1981); D. McLaughlin & A. Schoomaker, *The Landrum-Griffin Act and Union Democracy* 35, 37 (1979); J. Wallihan, *Union Government and Organization* 116 (1985); James, *supra*, at 270-83; Summers, "Democracy in a One-Party State: Perspectives From Landrum-Griffin," 43 Md.L.Rev. 93, 96-99, 113-14 (1984); Note, "Union Elections and the LMRDA: Thirteen Years of Use and Abuse," 81 Yale L.J. 407, 419-20 (1972).

Professor Clyde W. Summers, one of the nation's leading authorities on union democracy, has cogently explained some of the ways in which incumbents maintain their advantages in union elections, even when in technical compliance with the election provisions of the LMRDA:

> The [incumbent] . . . inevitably retains great advantages in mounting election campaigns. The union newspapers cannot be used during the election period, but in the period between elections the incumbents have a press monopoly. The newspaper must maintain a pretense of neutrality during the weeks immediately before an election, but it can be, and is, used to praise the officers and their policies in the years between elections. Paid employees cannot campaign on working time except, in the words of the Secretary of Labor, "campaigning incidental to union business." For staff representatives or business agents who are in constant contact with members, "incidental" campaigning may be pervasive, and because their function is to handle grievances, negotiate agreements, and otherwise be of service to the members, their campaigning is particularly effective. Many of the paid staff normally work long and irregular hours. If they do not campaign during the nine to five forty-hour week, they will still have many working hours left in which to campaign. There is no limitation on campaigning by those who have been given unpaid, but much sought after, committee assignments or other prestigious positions.
>
> Beyond these nearly overwhelming organizational advantages, the incumbents have equally overwhelming advantages in raising funds to conduct the campaign. The paid staff is asked to contribute generously, and they understand that their salary is paid with a lien for generous amounts . . . .
>
> Opposition groups have no remotely comparable organization or source of funds.

Summers, *supra*, at 113-14 (footnote omitted). Incumbents can reinforce these enormous advantages by making staff appointments understood by all to be dependent upon staff donations of time and money to the incumbents' reelection campaigns, *Finnegan v. Leu*, 456 U.S. 431 (1982), and by promulgating union rules forbidding challengers from raising campaign funds from nonmembers. *United Steelworkers v. Sadlowski*, 457 U.S. 102.

These advantages of incumbency are not merely theoretical. That is reflected in the low turnover rates documented among top officers of national unions like petitioners in this case. *See* Estey, *supra*, at 62-63;

Wallihan, *supra*, at 116. Even when officer turnover does occur, it is rarely at the expense of an incumbent:

> Much has . . . been made of . . . leaders who hold office for life or until they chose to step aside. Those aspiring to higher leadership positions can either wait their turn or try to unseat a presumably well-organized and visible incumbent. In most cases, the first path is followed, and most office-seekers advance, as did many of the current leaders, through "dead man's shoes."

Quaglieri, "The New People of Power: The Backgrounds and Careers of Top Labor Leaders," 9 J.Lab.Res. 271, 279 (1988).[9]

C. Opportunities For Early Mailings Of Campaign Literature Are Essential If Challengers Are To Have Any Chance Of Overcoming The Advantages Of Incumbency Typically Enjoyed By Their Opponents

Control over the means of communication with the membership is perhaps the most important of the many advantages enjoyed by incumbents in union election campaigns. This was succinctly explained in a now classic study of union democracy:

> [A] major source of administrative power in most organizations is the administration's exclusive control over the formal channels of communication

[9] Officer turnover is generally greater at the local union level, but among local officers, turnover rates drop by nearly one-third among the better paid, who are typically the top officers of large locals. *See* Applebaum & Blaine, "Compensation and Turnover of Union Officers," 14 Indus.Rel. 156 (1975).

> with the members. Ordinarily a union administration's control of the union newspaper, local meetings, and international conventions, and its own full-time staff whose members are paid to travel around and talk to local members and leaders, amount to a near monopoly of the channels of communication to the membership . . . . [S]uch monopolization of the channels of communication, with the consequent absence of counter-propaganda, is one of the basic conditions for the effectiveness of propaganda. This condition . . . is indigenous to totalitarian states; it is also characteristic of the one-party structure of most labor unions.
>
> Such a monopoly over the internal channels of communications works to reduce the expression of disaffection among the membership, and thus to minimize the political effect of what disaffection there is. On the one hand, the only facts and viewpoints bearing on union matters that are widely available to the membership under such conditions are those disseminated by the administration. Official policy is justified, while alternative proposals or programs, if mentioned at all, are discredited. On the other hand, even if the membership is not convinced of the correctness and efficiency of administration policies and there is widespread discontent, the discontent remains atomized, privatized, or restricted to small politically irrelevant groups, and is not focused and organized behind

—a single set of alternative proposals.

Lipset, Trow & Coleman, *supra*, at 260-61.

This domination of the union press by incumbent officers was specifically brought to the attention of Congress by no less an authority than Professor Archibald Cox, who participated in the drafting of the Act as a consultant to Senator John F. Kennedy, the chair of the Senate Subcommittee on Labor. *See* A. McAdams, *Power and Politics in Labor Legislation* 77, 244 (1964) (describing Cox's role). As Professor Cox testified, the consequences of that domination are particularly troubling in the context of referendum voting for officers of national unions, like petitioners in this case: "[I]n a referendum, [the opposition] must build up national popularity in competition with the only names well known to all the members; and the incumbents control the union newspaper which is the chief vehicle for communication with the members." *Hearings on S.505 Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, 86th Cong., 1st Sess. 134 (1959).

The §401(c) requirement at issue in this case, that unions comply with reasonable requests by candidates to mail campaign literature to the membership at the candidate's expense, was thus an important part of Congress' response to the problem of incumbent monopolization of union communication channels. That provision, therefore, should be interpreted in a manner that will reduce those advantages of incumbency, not increase them. *Cf. Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. at 468 (the LMRDA should be interpreted "in light of the general objectives Congress sought to achieve"); *United Steelworkers v. Sadlowski*, 457 U.S. at 121-22 (a question about Congress's intent in enacting a provision of the LMRDA is "best answered by identifying the problem that Congress intended to solve by adopting the provision")(White, J., dissenting).

An interpretation of §401(c) that would deny candidates for union office the opportunity to communicate, at their own expense, with the union's membership through campaign mailings *at any time* after they have declared their candidacies would thus undermine that provision's legislative purpose by limiting challengers' access to the very resource -- an ability to communicate with the electorate -- that Congress intended them to have in order to overcome the advantages of incumbency that result from control over union media. It is impossible to overstate the importance of the right of candidates to mail campaign literature to the membership pursuant to §401(c), particularly in large locals and in regional and national union elections where there is no other way to reach the entire membership. Indeed, a study sponsored by the Department of Labor reported that challengers who defeat incumbents in union elections most often credit "the campaign literature mailing right alone [as] spell[ing] the difference between victory and defeat for them." McLaughlin & Schoomaker, *supra*, at 21. *See also* L. Sayles & G. Strauss, *The Local Union* 83 (rev. ed. 1967)(in contested union elections, "a given candidate's chances for success depend to a considerable extent upon his communications opportunities").

A candidate's right to mail campaign literature will only be effective, however, if that right can be exercised throughout the campaign, including during its formative stages. This is so because "the skillful incumbent," through control of the union's media, "will try to establish an image of invincibility *prior to* commencement of an election campaign," in order to discourage potential challengers from running, and to foster a belief among the membership that it would be futile and perhaps foolhardy to support any challengers who do emerge. Jacobs & Spring, "Fair Coverage in Internal Union Periodicals," 4 Indus.Rel.L.J. 204, 218 (1981)(emphasis in original). As one might expect, it is also the case that "the most secure [union officials], politically, are those

who campaign twelve months a year." Strauss, "Control by the Membership in Building Trades Unions," *in Unions and Union Leadership* 176, 186 (J. Barbash ed. 1959). Thus, the reality is that most incumbent union officers, like most elected public officials, in effect begin their reelection campaigns the day after they take office. It is crucial, therefore, that challengers have a meaningful opportunity for early campaigning as well. In *Wirtz v. Hotel Employees*, this Court noted that "Congress' model of democratic [union] elections was political elections in this country . . . ." 391 U.S. at 504. In the context of such political elections, it is well understood that "early [campaigning can] afford greater exposure to the public for candidates who were not particularly well known, thus enabling them to gradually build voter recognition." Ifshin, "An Analysis of the Impact of the Federal Election Campaign Act on the 1976 Democratic Presidential Primary," 18 Santa Clara L.Rev. 1, 31 (1978). Indeed, the importance of early campaigning was expressly recognized by Congress in §408(c) of the Federal Election Campaign Act, which subsidizes campaign expenses incurred by presidential candidates as long as *22 months* before the election. 26 U.S.C. §9034. There is no justifiable reason why candidates for union office should be prohibited from campaigning, at their own expense, for just as long.

The need for early communication with the members is even more necessary because most unions, as this Court has recognized, have no "permanent 'opposition party' within the union." *Local 3489, United Steelworkers v. Usery* , 429 U.S. at 311. Instead, "[t]here is only a one-party system consisting of the union's incumbent officers and hired staff all controlled from the top down." *United Steelworkers v. Sadlowski*, 457 U.S. at 128 (White, J., dissenting). Even where an opposition group exists, it typically has "no stable organizational structure, no officers or staff, no patronage, no established channels of communications, and little resources. At best, it is a

loose coalition . . . ." Summers, *supra*, at 105.

To have any chance of success in these circumstances, challengers must have an opportunity to begin reaching the membership with their message early in a campaign, long before candidates are formally nominated. "Educating union members about the merits of a political platform inherently takes . . . time." Nyden, "Democratizing Organizations: A Case Study of a Union Reform Movement," 90 Am.J.Soc. 1179, 1193 (1985). Moreover, in the absence of a permanently organized opposition party, as the Court noted in *Local 3489, Steelworkers*, "opposition to the incumbent leadership is likely to emerge *in response to particular issues at different times*." 429 U.S. at 311 (emphasis added). Just as this fact supported the Court's *Steelworkers* decision to strike down a candidate eligibility rule because it unrealistically *required* potential candidates to begin planning their campaign too soon (eighteen months before the election), *id*., it supports the conclusion that the union's rule here unreasonably *prohibits* opposition candidates from effectively communicating with the membership about important issues until late in a campaign, when there is little time left to mobilize support. Candidates must not be limited to communicating their views on particular issues only during the final days of an election campaign. They must be permitted to circulate their views whenever they believe the issues are of greatest interest to the membership. That may be much earlier, when the issues first arise. That is when challengers can begin laying the foundation for a successful campaign by acquiring name recognition and staking out their positions with the electorate.

Petitioners stress the fact that, in their union, candidates can nominate themselves without any prerequisite showing of membership support. Pre-nomination campaigning, petitioners suggest, is therefore unimportant. Pet. Br. at 24 n.8. But the importance of waging an

effective campaign before nomination is not limited simply to achieving formal nomination. By facilitating the formation of coalitions among diverse opposition elements within the union and by recruiting like-minded members into those coalitions, pre-nomination campaigning also enhances the likelihood that a unified slate of challengers will emerge to unseat incumbents, which substantially improves that slate's prospects for success. Department of Labor regulations and several lower courts have established that members can be "bona fide candidates" for purposes of §401(c) campaign mailings before they are formally nominated, and unions cannot be permitted to nullify that determination. 29 C.F.R. §452.80 (1989); *Cotter v. Helmer*, 692 F.Supp. 313 (S.D. N.Y. 1988); *Morrissey v. Curran*, 356 F.Supp. 312 (S.D. N.Y. 1973); *Yablonski v. United Mine Workers*, 71 L.R. R.M. 2606 (D.D.C. 1969).

Amici urge that candidates for union office be permitted to exercise their §401(c) rights to mail campaign literature to the membership almost *any time* an announced candidate willing and able to bear the cost of a mailing requests one.[10] Requests for mailings should be presumed "reasonable" unless the union can demonstrate that the request imposes unjustifiable logistical burdens on the union. For example, it would be unreasonable for a candidate to refuse to comply with a uniformly applied union requirement that the estimated costs of the mailing be tendered in advance. *See* 29 C.F.R. §452.69 (1989). Similarly, it would be unreasonable for a candidate to deliver campaign literature to the union

[10] This view is consistent with that of experts on union democracy, who suggest that candidates need opportunities to reach the membership for at least six months before an election but caution that "[c]onsidering how early the campaigns begin in [some unions], even this may not be enough." J. Edelstein & M. Warner, *Comparative Union Democracy: Organization and Opposition in British and American* 367 (rev.ed. 1979).

at 9 a.m. and demand that it be processed in time to be sent out in that day's 10 a.m. mail. On the other hand, a union "may not refuse to distribute campaign literature merely because it may have a small staff which cannot handle such distributions for all candidates." *Id.* In such cases, "the organization may employ additional temporary staff or contract the job to a professional mailer and charge the expense incurred to the candidates for whom the service is being rendered." *Id.* Since mailings in large national unions, even at bulk rates, can cost tens of thousands of dollars, *see* James, *supra*, at 279, few candidates will be in a position to exercise their §401(c) mailing rights frivolously, especially in the face of *Sadlowski*-type bans on outsider contributions to their campaigns.

In any event, a candidate's request, as here, for a mailing of campaign literature a mere two months before an election is comfortably within any appropriate definition of what a "reasoned request" might be.

III. OPPORTUNITIES FOR EARLY MAILINGS OF CAMPAIGN LITERATURE FURTHER THE LMRDA'S LEGISLATIVE PURPOSE OF ENABLING UNION MEMBERS TO BE INFORMED ABOUT UNION AFFAIRS

A fundamental assumption underlying the enactment of the LMRDA was that, "Given the maintenance of minimum democratic safeguards *and detailed essential information about the union*, the individual members are fully competent to regulate union affairs." S.Rep. No. 187, *supra*, at 7, *in* 1 Leg.Hist., *supra*, at 403 (emphasis added). Congress was "confident that union members . . . having the benefit of secret elections . . . would rid themselves of untrustworthy or corrupt officers," but that confidence was premised on a membership "*armed with adequate information*." *Id.* at 9, 1 Leg.Hist. at 405 (emphasis added).

In order to "arm" union members with the knowledge they need to make informed decisions about union affairs and to cast informed votes in union elections, Congress repeatedly included throughout the LMRDA reporting, disclosure, and free speech provisions that together amount to nothing less than a union member's "right to know." *See, e.g.*, LMRDA §104, 29 U.S.C. §414 (member's right to copies of collective bargaining agreements); *id.* at §105, 29 U.S.C. §415 (obligation of unions to inform members of their rights under the Act); *id.* at §201(a), 29 U.S.C. §431(a)(obligation of unions to adopt detailed constitutions and bylaws and make them available to the members); *id.* at §201(b), 29 U.S.C. §431(b) (financial reports of unions and union officers); *id.* at §201(c), 29 U.S.C. §431(c)(member's right to examine union and officer financial reports and, "for good cause," any union books, records, and accounts); *id.* at §301, 29 U.S.C. §461 (trusteeship reports); *id.* at §401(c), 29 U.S.C. §481(c)(candidates' right to inspect union membership lists); *id.* at §501(b), 29 U.S.C. §501(b)(member's right to an accounting).

The union member's right to know implicit in these reporting and disclosure provisions is rooted further in the equal rights and free speech provisions of Title I's bill of rights for union members.[11] LMRDA §§101(a)(1) & (2), 29 U.S.C. §§411(a)(1) & (2). Lower courts have repeatedly found in the members' Title I rights to vote in union elections or referenda and to speak freely at union meetings or elsewhere about candidates for union office or other aspects of union affairs a right to *informed* voting and *informed* discussion. As one court explained:

> The right to express views in ignorance of facts is a hollow right. Though the ignorance of the member is no basis for suppressing his views, a union can hardly be said to be affording a member the right to "express . . . views, arguments, or opinions . . . upon any business" of the union when a union deliberately . . . keeps its members in ignorance.

Daniels v. Post Office Mail Handlers, 454 F.Supp. 336, 339 (E.D.Va. 1978). According to another court, union officers have a fiduciary duty "to see that the lines of communication and dissemination of views and opinions are kept open and working, especially as to matters on which members will be asked to vote." *Blanchard v. Johnson*, 388 F.Supp. 208, 214 (N.D. Ohio 1975), *modified on other grounds*, 532 F.2d 1074 (6th Cir.), *cert. denied*, 429 U.S. 869 (1976).

The LMRDA's right to know is particularly important in the context of union referenda. Several courts have implied under Title I, at least under certain circumstances, a union obligation to provide dissidents with the means (at their own expense) of communicating to the membership the dissidents' views on referendum issues. *See, e.g., Rural Letter Carriers, Knox County Local v. Rural Letter Carriers*, 720 F.2d 936 (6th Cir. 1984)(union must allow local opposed to ratification of collective bargaining agreement to advertise in union's magazine); *Lodge 1389, B.R.A.C. v. Dennis*, 625 F.2d 819 (9th Cir. 1980)(local union stated claim cognizable under §101 (a)(2) when it sought access to national union's membership list for purposes of campaigning for membership ratification of a proposed amendment to the national union's constitution); *Sheldon v. O'Callaghan*, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974)(union required to give dissidents' mailing service access to

[11] This Court has indicated that Title IV should be interpreted in light of the provisions of the subsequently added Title I precisely because Congress feared that Title IV did not provide sufficient protection to union members. *United Steelworkers v. Sadlowski*, 457 U.S. at 117 n.10. *See also Local 82, Furniture and Piano Movers v. Crowley*, 467 U.S. 526, 556 (1984)(Stevens, J., dissenting).

union membership list); *Cotter v. Helmer*, 692 F.Supp. 313 (relying on §101(a)(2) as well as §401(c) to grant candidate pre-nomination mailing rights related not only to the business manager election but also to a vote at a membership meeting on incumbent business manager's proposal that candidate be removed from assistant business manager position); *Blanchard v. Johnson*, 388 F. Supp. 208 (members opposing incumbents' proposal have right to distribute literature through independent agency conducting the referendum).

In the context of union officer elections, deference to Congress' remedial purpose of promoting informed discussion and informed voting requires that §401(c) be construed to permit candidates to mail campaign literature during the crucial early stages of a campaign, when key issues are starting to emerge, candidates are assembling their slates, and voters' minds are still open. *Cf. Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980)(remedial legislation should be liberally construed). Discussions of union policies and programs become most meaningful when they are linked to election contests. When members believe it is actually possible to affect policy by electing or defeating candidates who are pledged to specific policies, all discussions are brought from a level of abstraction to one of concrete possibility. Members are aroused to take an interest in union affairs when they realize that they can implement a program by electing candidates pledged to that program. By putting forth his or her candidacy, a union member makes clear that he or she is not simply blowing off steam but is serious about his or her proposals and intends to carry them out. Such conditions stimulate democratic discussion by the entire membership, and the democracy in unions that Congress intended to promote with the LMRDA grows stronger.

IV. PETITIONERS' RULES RESTRICTING A CANDIDATE'S RIGHT TO MAIL CAMPAIGN LITERATURE ARE ENTITLED TO NO DEFERENCE BECAUSE THEIR ANTIDEMOCRATIC EFFECTS FAR OUTWEIGH ANY LEGITIMATE UNION INTERESTS THEY MAY SERVE

Amici contend that the reasonableness of a candidate's request for the mailing of campaign literature should be determined without regard to inconsistent union election rules. If, however, this Court concludes that some deference is due union rules in this context, the appropriate test for judging the reasonableness of those rules can be found in *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305. In that case, involving the "reasonable qualifications" that §401(e) permits unions to establish for union members to be eligible to run for union office, the Court held that reasonableness must be determined by balancing "the antidemocratic effects of the . . . rule [against] . . . the [union] interests urged in its support." 429 U.S. at 310.[12]

In applying this test, courts must be aware of the fact that many of the antidemocratic consequences of the one-party system that produce electoral advantages for incumbents are also at work when incumbents put forward electoral rules that limit efforts by challengers. For

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[12] This test is consistent with that developed in the analogous context of the internal union affairs proviso found in §8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A). That proviso shields unions from unfair labor practice charges when they discipline members for violating union "rules with respect to the acquisition or retention of [union] membership." In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Court held that the proviso applies only when the union rule in question "reflects a legitimate union interest" and "impairs no policy Congress has imbedded in the labor laws." In applying the *Scofield* test, the NLRB and the courts have consistently found union rules that undermine the LMRDA to be outside the protection of §8(b)(1)(A)'s proviso. *See, e.g., Helton v. NLRB*, 656 F.2d 883, 893 -96 (D.C.Cir. 1981)); *Carpenters Local 22*, 195 N.L.R.B. 1 (1972).

that reason, union restrictions on challengers' abilities to campaign effectively must be "strictly scrutinized and stringently tested." Summers, *supra*, at 116.

The antidemocratic effects of the union's rule in this case are substantial, and they easily outweigh the relatively minor union interests urged in its support by petitioners. As argued previously, under even the best of circumstances, opportunities for early mailings of campaign literature are essential to further the LMRDA's legislative purpose of leveling the playing field between challengers and incumbents in union officer elections. In maritime unions like the petitioner union, where members are dispersed and isolated on ships all over the globe for months at a time because of the nature of their work, the need for early campaign mailings is even greater if challengers are to have any chance of overcoming the advantages of incumbency enjoyed by their opponents.

The union's rule in this case prohibits §401(c) mailings of campaign literature until the final days of a campaign and therefore operates to deny the union's scattered membership any meaningful opportunities to have informed discussions among themselves about the candidates and the issues at stake in the election. The union's rule thus produces the overwhelmingly antidemocratic effects of (1) prolonging the incumbents' monopoly over the channels of communication with the membership, (2) crippling the efforts of challengers to form coalitions and generate a unified slate of candidates, and (3) forcing the members to cast their ballots without the benefit of informed discussion and debate.

Only the strongest of union interests would be sufficient to outweigh the antidemocratic effects of the union's rule in this case, and the interests identified by petitioners and *amicus* AFL-CIO do not even come close. Certainly the cost of postage or processing is not a factor justifying union restrictions on §401(c) mailing

rights, since the statute expressly requires the candidates to bear those costs. Nor can petitioners claim credibly that early or frequent candidate mailings will impose any significant administrative or logistical burdens on the union. Department of Labor regulations make clear that unions with small staffs may hire temporary help to handle the mailings or contract the jobs out to a commercial mailing house, and charge the expenses incurred to the candidates who requested the mailings. 29 C.F.R. §452.69 (1989). Making such arrangements in most cases would entail no more than a few telephone calls.

Petitioners claim that by prohibiting campaign mailings until after candidates are formally nominated and certified, their rule "protects the campaign's integrity . . . [by] restrict[ing] the use of the mailing procedure to actual, eligible candidates." Pet. Br. at 23. Accordingly, they argue, the rule frees them of the burden of having to "continuously assess" candidates' requests for mailings, forcing the union's officers to "tak[e] time from their other important responsibilities." *Id.* at 24. That argument, however, is largely premised on the faulty assumption that only candidates who have been formally nominated are entitled to campaign mailings under §401(c). Once that assumption is abandoned -- as it must be in accordance with Department of Labor regulations and court decisions, *supra*, at p.20 -- there is very little left for a union legitimately to "assess" in responding to a candidate's request that his or her campaign literature be mailed to the union's membership. All the union need consider is whether the candidate has declared his or her intent to seek office and whether the candidate has complied with such reasonable mailing related rules as requirements that the candidate tender payment for the estimated costs of the mailing in advance. Determinations that candidates meet the union's reasonable qualifications for office will have to be made sooner or later for every candidate in any event. If a union believes it is more efficient to postpone those

determinations until such time as candidates are formally nominated, nothing in §401(c) would prevent it from doing so, as long as announced candidates are not deprived of their mailing rights in the meantime.

Petitioners and *amicus* AFL-CIO also argue that the union's rule in this case is reasonable because it promotes uniformity in the handling of candidates' requests for mailings, thereby reducing the risks of discrimination inherent in *ad hoc* decisionmaking. As the court explained in *Alvey v. General Electric Co.*, 622 F.2d 1279, 1286 (7th Cir. 1980), however, "[t]he need for uniformity . . . is analytically empty for our purposes because virtually any rule imposed by a . . . union -- even rules improperly based on race, sex, or religion -- would include the characteristic of uniformity." The fatal flaw in petitioners' refusal to honor respondent's §401(c) request to mail campaign literature was not that it was based on a union rule, but that it was based on an *unreasonable* union rule -- one that effectively deprives union members of timely information needed for full and fair decisionmaking, thereby violating the LMRDA and its legislative purpose of leveling the playing field between challengers and incumbents.

Thus, petitioners in this case have failed to identify any legitimate union interests served by their restriction on candidates' campaign mailing rights that can outweigh the very substantial antidemocratic effects of those restrictions.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the judgment of the court below.

Respectfully submitted,

Michael J. Goldberg
(*Counsel of Record*)
Widener University School of Law
3800 Vartan Way
Harrisburg, Pennsylvania 17110
(717) 541-3938

Helen Hershkoff
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Susan Goering
ACLU of Maryland
2219 St. Paul Street
Baltimore, Maryland 21218
(301) 889-8555

Judith R. Schneider
Association for Union Democracy
30 Third Avenue, #619
Brooklyn, New York 11217
(718) 855-6650

Clyde W. Summers
University of Pennsylvania
School of Law
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-6867

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